



Appeal of James W. and Margaret R. Henderson

The primary issue for determination is whether appellants James W. and Margaret R. Henderson were entitled to a child care expense tax credit for 1978.

On their 1978 California joint personal income tax return, appellants reported adjusted gross income of \$43,926 and claimed a credit for child care expenses in the amount of \$120. Within two years after the return was filed, respondent disallowed the credit, explaining that the credit is not available for taxpayers whose adjusted gross income is \$20,000 or more. (Rev. & Tax. Code, § 17052.6, subd. (a)(3).) In their protest and appeal, appellants contend that section 17052.6 is unfair and unconstitutional because it does not allow the credit for members of appellants' income bracket. They also object to the imposition of interest on the proposed assessment, arguing ~~that~~ the Franchise Tax Board delayed in issuing this assessment.

Revenue and Taxation Code section 17052.6 provides a limited credit of three percent of household services and expenses incurred by income-earning individuals for the care of certain dependents. According to subdivision (a)(3), a taxpayer whose adjusted gross income is at least \$20,000 is ineligible for the credit. (Appeal of James W. and Margaret R. Henderson, Cal. St. Bd. of Equal., Feb. 6, 1980.) Appellants' contention that this subdivision is unconstitutional should not be argued before this forum because section 3.5 of article III of the California Constitution precludes us from determining that the statute is unconstitutional or unenforceable; furthermore, it has been our consistent policy not to rule on constitutional questions in appeals involving deficiency assessments. (See, e.g., Appeal of Leon C. Harwood, Cal. St. Bd. of Equal., Dec. 5, 1978; Appeal of William F. and Dorothy M. Johnson, Cal. St. Bd. of Equal., Oct. 5, 1976.) Appellants may obtain an adjudication of the constitutionality of this section by paying the assessment and then instituting a refund action in a state court of law. (Rev. & Tax. Code, § 19082.)

Appellants' arguments against the imposition of interest are of no avail in view of Revenue and Taxation Code section 18688, which mandates that interest be imposed on a deficiency assessment from the date the tax is due until the date it is paid. (Appeal of Ronald J. and Luella R. Goodnight, Cal. St. Bd. of Equal., June 28, 1979; Appeal of Samuel C. and Lois B. Ross, Cal. St. Bd. of Equal., May 4, 1978.) **This requirement is not**

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overcome by respondent's delays in determining a proposed assessment, so long as it is issued within the statutory four-year period of limitation. (Rev. & Tax. Code, § 18586; Appeal of Arthur H. and Betty R. Muller, Cal. St. Bd. of Equal., May 9, 1979; Appeal of Patrick J. and Brenda L. Harrington, Cal. St. Bd. of Equal., Jan. 11, 1978.)

The arguments appellants present in this case are identical to those that this board considered and rejected in the taxpayers' prior appeals to this forum. (Appeal of James W. and Margaret R. Henderson, supra; Appeal of James W. Henderson, Cal. St. Bd. of Equal., Jan. 9, 1979.) In those cases, after careful consideration, we affirmed both the disallowance of their claimed child care credits and the imposition of interest upon the deficiency. The facts and the law which dictated the result in those cases have not changed in a manner that warrants our reaching a contrary result in the present case. We will therefore sustain respondent's determination.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of James W. and **Margaret** R. Henderson against a proposed assessment of additional personal income tax in the amount of \$119.50 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of August , 1983, by the State Board of Equalization, with Board Members **Mr.** Bennett, Mr. Collis, Mr. Dronenburg, Mr. Nevins and Mr. Harvey present.

William M. Bennett, Chairman
Conway H. Collis, Member
Ernest J. Dronenburg, Jr., Member
Richard Nevins, Member
Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9